IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. 74313/2016

In the matter between:

PROXI SMART SERVICES (PTY) LTD	Applicant
and	
THE LAW SOCIETY OF SOUTH AFRICA	First respondent
THE CHIEF REGISTRAR OF DEEDS	Second respondent
ROGER DIXON	Third respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth respondent
THE ATTORNEYS FIDELITY FUND	Fifth respondent
THE LAW SOCIETY OF KWAZULU-NATAL	Sixth respondent
THE CAPE LAW SOCIETY	Seventh respondent
THE LAW SOCIETY OF THE FREE STATE	Eighth respondent
THE LAW SOCIETY OF THE NORTHERN PROVINCES	Ninth respondent
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Tenth respondent
BLACK LAWYERS ASSOCIATION	Eleventh respondent
THE BLACK CONVEYANCERS ASSOCIATION	Twelfth respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Thirteenth respondent
THE NATIONAL FORUM ON THE LEGAL PROFESSION	Fourteenth respondent

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APPLICANT'S SUBMISSIONS IN THE APPLICATION FOR LEAVE TO APPEAL

I. INTRODUCTION

1. On 16 May 2018, the applicant's application for declaratory relief was dismissed with costs. Its application for leave to appeal was lodged on 6 June 2018. Since then the applicant has endeavoured at frequent intervals to enrol this. It has now been set down for hearing at 9h30 on Monday 10 December 2018. These submissions have been prepared to assist the court and to abbreviate oral argument.

2. Our argument may be summarised very shortly.

3. It is convenient to begin with the second of the two criteria laid down in s17(1)(a) of the Superior Courts Act 10 of 2013 ('the Act'). This is because the requirement of some other compelling reason to grant leave, prospects of success quite apart, cannot seriously be in question. It is also dispositive. The importance of the case was indicated at the outset when a Full Bench was convened to hear it at first instance. After protracted engagement with the first respondent, seeking to find a resolution of issues, the applicant, a trading entity, had sought to exercise its fundamental right in terms of section 22 of the Constitution. This right relates to providing services, efficiently and competitively, to the public in the conveyancing process which respect and exclude the professional functions of conveyancers. In this the applicant has been opposed by national and provincial legal bodies, the Fidelity Fund and the Minister of Justice. Asserting the protection of the public at large as well as the interests of thousands of conveyancers, the antagonists do so on grounds of unlawfulness. As well as being thus far-reaching, in part the questions raised are novel. Legal developments elsewhere have come into question (the

authorities invoked on both sides of the case were left unconsidered in the judgment). Cumulatively, these are indeed compelling reasons for the conclusions reached by the court to be reappraised on appeal, in a matter thought important enough, as already noted, to be allocated to a Full Bench at first instance.

4. As regards the remaining criterion, it should be fairly acknowledged by the respondents that a reasonable prospect exists that another court (in this case, it must be the Supreme Court of Appeal) may reach a different conclusion. This on any one of the several separate bases examined below. This court with perfect accuracy summarised (in paragraph 5 of its judgment) the sharply defined central dispute between the parties. That dispute has no blurred edges, and is entrenched. It is, in the lapidary phrase of the law societies themselves, simply whether "*the full conveyancing process is reserved work*". The court, having not only without difficulty recorded the core dispute, and its entrenched nature, also found itself able to determine that the model contravened both s83(8)(a)(i) of the Attorneys Act and Rule 49.17 of the Consolidated Rules for the Attorneys' Profession . Yet having done this, it thereupon held that the application was premature – so much so that the applicant lacked *locus standi*. It is respectfully submitted that another court may reasonably hold that the inverted sequence adopted by this court (a dismissal on the merits then a dismissal on procedural ripeness) entails both inverted logic and flawed premises, in the respects later detailed. Further, that on both the procedural and merits issues, if engaged in the correct order, another answer is properly to be given. On the former, principles laid down in binding decisions of the Supreme Court of Appeal were, we shall show, not applied. On the latter, as already noted, authorities in point by courts elsewhere invoked by the applicant and respondents alike were not considered in the judgment. The net effect is, we submit, at least a

reasonable prospect of a different answer. This is that the application was not premature (or otherwise procedurally stillborn); and, on the merits, that the respondents are not right to contend that even the most clerical or administrative aspect of the transfer process is by law reserved for conveyancers (the pivotal issue left unaddressed) – or in the dispositive respects we address separately below.

5. As the court may however not wish to determine the application on the shortened basis set out above, but may require a detailed analysis relating the grounds of appeal, we now turn to undertake that. Before doing so, we may finally note by way of summary that the cross-application made, and argued, by the respondents need not be dealt with. This because the court omitted to address it either in the judgment or order, and because none of the respondents seeks leave to cross-appeal now against that omission.

II. GROUNDS FOR LEAVE TO APPEAL

6. An application for leave to appeal does not entail a reargument of the original matter. Nor is it met by assertions from respondents in such applications that the court in question "correctly" determined the issues. Neither the court's demonstrated wrongness nor its infallibility is the measure. Instead leave to appeal entails (since the statutory amendment in 2013[1]) two specific separate tests. If either is met, leave is properly to be granted.

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[1] Section 17(1)(a) of the Act.

7. The first is whether there are reasonable prospects that another court may reach a different conclusion.[2] The application for leave to appeal identifies at length (in paragraphs 1 to 38) why the applicant contends that, in a number of respects, such prospects exist. The application itself is not replicated verbatim here, but to the essence of these grounds we now turn.

8. It is submitted that there is at least a reasonable prospect of another court differing from this court. This in respect of each of its five principal findings. Should the Supreme Court of Appeal differ with regard to one or more of these findings, the order made cannot, it is submitted, stand.

9. The five principal findings (set out in the sequence the court chose) are these:

   (1) The distinction between 'reserved' and 'non-reserved' does not exist in law: it is only of the applicant's making.[3] This proposition is central to the judgment.

   (2) The model contravenes s83(8)(a)(i) of the Attorneys Act in that, so the court found, the applicant will in pursuance of the model draw up or prepare reserved documents, or cause reserved documents to be drawn up or prepared.[4] This is also core.

   (3) The model contravened Rule 49.17 of the Consolidated Rules for the Attorney's Profession.[5] Again, a core finding.

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2 Section 17(1)(a)(i).

3 Judgment para 9.

4 Judgment paras 18 to 20, 29 to 31 and 51 to 53.

5 Judgment paras 41 to 42.

(4) The relief sought by the applicant is not competent in that "*the terms and purpose of the order sought are not clear*".[6]

(5) Finally, the applicant had not made out a case for declaratory relief.[7] Firstly in this regard, it was – so the court held - premature for the applicant to approach the court prior to implementation of the model. The court held[8] that until such time as the model was fully finalised and implemented, the model (and the matter) remained "*abstract and hypothetical*". Even then, the court held, the implementation of the model would not create a dispute between the applicant and the respondents that would be resolved by the declaratory relief sought. As a result, the court reasoned that the applicant did not even have standing: it lacked a direct and substantial interest in obtaining declaratory relief.[9] Each of these findings is presented as dispositive.

10. It is submitted that there is a reasonable prospect another court may hold this court's judgment to be fundamentally flawed as regards these findings. We highlight the three overarching aspects of what the court did.

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6 Judgment paras 54 to 63.

7 Judgment paras 68 to 78.

8 Para 71.

9 Para 75.

III. WHAT THIS COURT DID

(1) INTERNAL CONTRADICTION

11. It is respectfully submitted that there is a reasonable prospect another court will consider that what the court did in reaching these findings was internally inconsistent. This to the point of a contradiction between the premises for the separate findings.

12. The first is that the court disposed of the merits (or at least certain core components thereof) – and then having done so, roundly, ruled that the matter was not ripe for determination and that the relief sought (i.e. with regard to both the formulation of the order sought and the requirements for declaratory relief) was not competent.

13. There is a reasonable prospect that another court may hold this to entail an evident self-contradiction. If it was premature to determine the merits, then in logic they could not be determined. Yet the court did so. It follows that it was not inhibited from doing so: there was no legal prematurity. *Res ipsa loquitur*.

14. Similarly, while the court in the first half of the judgment held that the model contravened s83(8)(a)(i) of the Attorneys Act (from which it follows that the implementation of the model would constitute a criminal offence), the court then proceeded in the second part of the judgment to find that the applicant was not prevented from proceeding to implement the model[10], and that the applicant was not entitled to approach the court for declaratory relief before doing so. ("*There*

[10] Judgment paras 71 and 72.

can be no clarity without first implementing the proposed model to determine whether it will fall foul of the listed legislation".[11])

15. In short, there is a reasonable prospect that the two parts of the judgment – dealing respectively with the merits and the relief sought – will be viewed by another court as being mutually destructive.

16. This fundamental contradiction aside, there are in our submission two further overarching flaws in the court's overall approach to the matter. These are, first, that the court misapprehended the nature and ambit of the relief sought, and, second, that on a factual level the court misconceived how the model is to operate.

(2) MISCONCEIVING THE RELIEF SOUGHT

17. The court appeared to approach the matter on the basis that it was being called upon to grant an umbrella sanction in respect of the model, i.e. to give the model the 'go-ahead' or 'all clear' on the basis that it was in all respects not merely lawful, but desirable (in the public interest) too, plus practically implementable and ready to proceed on the making of the order sought. (We refer below to the parts of the judgment that evidence that approach.)

18. This is, with respect, not what the relief calls for. The relief calls instead for an evaluation of defined conduct against a circumscribed set of statutory provisions. This the court had initially recognised to be the case, in the introductory part of the

[11] Judgment para 63.

judgment[12]. Is what the applicant proposes to do, and the respondents adamantly oppose, unlawful? That is the question. Is it the law of declaratory orders that a sharply-disputed legal compliance is not to be determined before the key is turned in the ignition? What was the true dispute? Was the latter not the stance of the law societies which preceded and precipitated the application? That they would not budge in contending that every single step in the process is reserved for conveyancers? Not whether the model was good, or good to go, because the last software gigabyte was polished to a turn.

19. The conduct in respect of which a declarator is sought is very specific. It is confined by annexure FA4B. This lists 56 tasks in the conveyancing process that the applicant proposes to undertake. Unfortunately the judgment reflects that the court (in paragraph 61 of the judgment) actually confused annexures FA4A and FA4B in referring instead not to the 56 steps tabulated but instead to 75 tasks.

20. The statutory provisions in respect of which the applicant seeks relief are identified in paragraphs 1.1.1 to 1.1.4 of the notice of motion.

21. In summary, the subject matter of the relief is conduct in the form of precise steps fully identified and particularised in the notice of motion (i.e. "*the steps in the transfer process identified in schedule 'FA4B'…*"[13]).

22. Of course, that conduct will not take place in a vacuum, but rather as part of the applicant's business model. It is for this reason that there is reference in the notice of motion to the model. The reference to the model simply contextualises the relief

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[12] Para 8.

[13] Para 1 of the notice of motion.

sought. In the words of the Constitutional Court in *Eke v Parsons*,[14] the purpose of the order "*is readily ascertainable from the language of the order*" itself. Patently, with respect, it is not the model itself that the court is asked to sanction, but rather, and explicitly, the applicant's "*performance of the steps…identified in schedule FA4B"*.[15] Simply put, is it lawful for the applicant to take those steps? Not whether the model by notions of practicality or policy should be the subject of judicial approbation.

23. The court's mistaken impression that it was called upon to give an all-encompassing pronouncement on the model seemingly explains the following features of the judgment:

23.1. First, the court's concern that FA4B does not include an exhaustive account of all steps taken in every conceivable conveyancing transaction.[16] This was not in issue. It also with respect is not the point. The point is whether the 56 steps identified in FA4B (not the 75 matters listed in FA4A) may lawfully be performed by the applicant. Thus, should the applicant in pursuance of the model perform any contentious step or activity not mentioned in FA4B, the applicant will not be able to shelter behind any order given in the terms sought by it.

23.2. Second, the court's comments on question of 'public interest' (that is, the general desirability of the model from the perspective of the public) are, with respect, not related to the relief sought in the notice of motion (and

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[14] 2016 (3) SA 37 (CC) at para 64.

[15] Notice of motion para 1.

[16] Judgment paras 17, 58, 59 and 77.

likewise unrelated to the relief sought in the counter-application – which, as noted, the court in any event did not determine). See in this regard paragraphs 32 to 40 and 50 of the judgment where the court evaluated the measures to be put in place under the model for the protection of client funds, the court concluding that these were inadequate[17], and that they fell short of providing the same level of "*comfort*" to the public as is enjoyed when funds are handled by attorneys and conveyancers.[18] These findings are entirely extraneous to the relief sought in the notice of motion (more particularly, to the question of whether the model contravenes any of the legislative provisions listed in paragraphs 1.1.1 to 1.1.4 of the notice of motion). There is a reasonable prospect that another court may consider that this court erred in considering that it was entitled, in a legality inquiry, to apply its own notions of what might be "*in the public interest".*

23.3. Third, the concerns expressed by the court regarding matters of practical implementation of the model. These are again matters that are unrelated to the circumscribed issues of legality presented by the notice of motion. (See for example paragraph 49 of the judgment where the court remarked that the implementation of the model might yet be stymied on a practical level if bond attorneys proved unwilling to co-operate with the applicant – which the court then correctly characterised as speculation[19] into which it should not properly be drawn.[20] But it had, with respect, just done so. This further

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[17] Para 35.

[18] Para 50.

[19] Or "*postulate*" as it was put in para 49 of the judgment.

[20] See also paras 58, 59, 63 and 71 where the attention of the court became fixed on whether or not the model was fully implementation-ready.

demonstrates that while the court had correctly recognised the focused nature of the relief sought in paragraph 8 of the judgment[21], the court's reasoning thereafter drifted to the extra-legal. It had, with respect, no jurisdiction to refuse the relief on the basis of its own notions of practicality.)

23.4. As we explain below, the consequence of the court's distraction in this regard is that the very crux of the dispute between the parties – as correctly identified in paragraph 5 of the judgment – was left undecided.

(3) FACTUAL ERRORS CONCERNING THE MODEL

24. The third and final encompassing respect in which we submit the court with respect erred in its approach to the matter is this. The court's factual conception of the model did not stay true to the account of the model given in the applicant's papers (and, more particularly, to the division of tasks set out in annexures FA4A and FA4B). Indeed, as we explain below, the court with respect largely disregarded or overlooked the facts set out in annexures FA4A and FA4B.

25. Insofar as the incorrect factual assumptions made by the court were attributable to a concern on its part that the model might not be implemented strictly according to its terms, the court's concern, properly understood, is not with the model itself, but with the implementation thereof. The distinction between validity and execution is fundamental to public law. The remedy is, to use the language of the Constitutional

[21] "*It is in respect of the tasks listed in FA4B that applicant seeks a declarator that performance thereof by the applicant will not contravene or otherwise fall foul of the subject legislation.*"

Court in *Jordan*[22] (to which the court's attention was drawn) not to strike down the model but to require that it be applied in a lawful manner.

26. We revert to these aspects later.

IV. DECLARATORY RELIEF

27. In declining to grant declaratory relief, the court reasoned as follows:

27.1. The model has not yet been implemented, and is not yet in all respects implementation-ready in that the software programme which is to facilitate the interface between the applicant and panel attorneys has not yet been developed. For these reasons, the model remains "*abstract and hypothetical*".[23]

27.2. There was nothing preventing the applicant from implementing the model.[24]

27.3. The implementation of the model would "*not create a dispute between the applicant and the respondents that would be resolved by the declaratory order as applicant is not subject to the disciplinary powers of any law societies*".[25]

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[22] *S v Jordan and Other (Sex Workers Education and Advocacy Task Force and Others as amici curiae)* 2002 (6) SA 642 (CC) para 74; see also *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552 (O) at 556H-557A.

[23] Judgment para 71.

[24] Judgment para 72.

[25] Judgment para 75.

27.4. It followed, so the court reasoned, that the applicant lacked a direct and substantial interest in the relief sought.[26]

27.5. The applicant therefore did not satisfy the first requirement for declaratory relief[27] (but was instead seeking "*legal advice from the court about the permissibility of its proposed business model*"[28]).

28. We submit that there is (more than) a reasonable prospect of an appeal court finding that this reasoning was flawed in the respects dealt with below.

29. First, the court's approach is at odds with a longstanding line of authority to the effect that where the legality of a proposed course of conduct is in dispute or in question, it is permissible – and indeed desirable – for the party proposing to embark on the conduct in question to approach the court for declaratory relief before doing so. It is not expected of an applicant in circumstances such as those to proceed with the proposed conduct and face the risk of prosecution. Another court may hold that the judgment clearly overlooks this principle, and the clear authorities binding on this court which underpin it.

30. Schreiner JA stated the principle (applied over and again since) with particular force in *Attorney-General of Natal v Johnstone & Co Ltd* [29]1946 AD 256 at 261:

"*It is thus fair to the employer that he should be able to ascertain in advance what his duties are. Where a difference of view as to the effect of such provisions manifests itself before the employer has committed himself to a particular course*

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[26] Ibid.

[27] Para 78.

[28] Para 77.

[29] 1946 AD 256 at 261. For two further compelling applications of the principle, see *Bryant v Minister of Labour and Miniter of Justice* 1943 TPD 205 at 207 (per Millin J), and *British Chemicals and Biologicals (SA) (Pty) Ltd v SA Pharmacy Board* 1955 (1) SA 184 (A) at 192.

he can obtain a declaratory order before his conduct has involved him in the risk of prosecution." (emphasis supplied)

31. Closely related is the further principle equally clearly established, that the need to make factual assumptions is no impediment to the grant of declaratory relief. This too has been stated clearly by the Supreme Court of Appeal, of which *Compagnie Interafricaine de Travaux v South African Transport Services and Another*[30] is an instance.

32. The court's approach in this matter was directly antithetical to that adopted by the Appellate Division in *Johnstone*'s case and in *Interafricaine*. The court reasoned, to the contrary, that the relief was not competent because the applicant has not yet implemented the model[31], whereas in *Johnstone*'s case the Appellate Division questioned whether the applicant in that case was disqualified from seeking declaratory relief by virtue of the fact that he had already implemented the course of conduct in question.[32] The applicant, in short, was obliged (on this court's reasoning) to turn the key in the ignition, or send the ship down the slipway, when the legality of doing so was starkly in issue.

33. Second (and as already touched on above), one cannot square the court's finding that the model contravenes s83(8)(a) of the Attorneys Act (and therefore constitutes a criminal offence) with its reasoning later in the judgment that the applicant was not prevented from implementing the model.[33] (That finding is in any event

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30 1991 (4) SA 217 (A) at 230I-231C.

31 See in particular para 63 of the judgment.

32 At 262 – the AD finding on the facts of that case that the applicant was not so disqualified.

33 Para 72.

incorrect on a factual level, given that Standard Bank and Investec had, on learning of the LSSA's attitude to the model, refused to make the necessary banking products available to the applicant until the dispute between the applicant and the law societies had been resolved).

34. Third, the principal dispute between the applicant and the law societies is an "*existing or concrete dispute*" (i.e. within the meaning of that phrase as it is used in the authorities on declaratory relief cited in paragraph 69, 70 and 74 of the judgment).

35. The principal dispute is whether or not the law societies are correct in their contention that "*the full conveyancing process is reserved work*". (It will be recalled that this was the position adopted from the outset by the law societies[34], and which led to the launch of the application.)

36. The court correctly identified this dispute, as already noted, in paragraph 5 of the judgment:

> "*The opposing respondents contend that all work, of whatever nature associated with immovable property transactions and transfers indivisibly and inseparably forms part of conveyancing practice, which has, by usage, custom and practice over centuries, bec[o]me work that is performed, and ought to continue to be performed, exclusively by conveyancers."* (emphasis supplied)

37. But then the court failed to determine that core dispute. With respect, that fundamental failure in itself clearly justifies the grant of leave to appeal.

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[34] See the letter written by the LSSA to the applicant on 2 June 2016 – FA3, p105.

38. The dispute as to whether the law societies are correct in contending that "*the full conveyancing process is reserved work*" is, we submit, ripe for determination.

39. The law societies' contention to the contrary is patently dilatory. The core dispute exists, as the court itself found. It has not been resolved. Now (while simultaneously refusing the application as premature relief sought by a party with no standing even to do so) the court has ruled upon the merits (or at least, as indicated, certain core aspects thereof) . If the judgment stands, the LSSA may publicly adopt the stance, as *custos morum* of the profession, that the model is unlawful on the grounds that "*the full conveyancing process is reserved work"* (a stance that has had, as we have explained, serious consequences for the implementation of the model). This while at the same time contending that the correctness of its stance is not justiciable by a court because it is not ripe. There is every prospect that another court may reasonably find this an unsustainable self-contradiction.

40. One of the court's reasons for finding that the application was premature was, we have intimated above, that the process administration software referred to in FA4A and FA4B[35] has not yet been developed.[36] As appears from FA4A and FA4B, the role of the software is to facilitate the capturing and sharing of information (such as the details of the parties to the transaction and the property concerned).

41. The court's concern about the undeveloped state of the software appears to have stemmed from its conclusion that the model will enable conveyancers to prepare

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[35] See paragraphs 3c, 4 and 5c of the former.

[36] Judgment paras 57, 58 and 71.

reserved documents "*at a push of a button*"[37], i.e. with all the preparatory work having been done by the applicant. But this is not what, on the evidence, another court may readily find, the model provides for. On the contrary, it is the conveyancer that (i) applies his or her mind to, and decides upon, "*the specific legal transfer documentation required for the specific type of transfer*"[38], (ii) decides upon the format of the required documents, (iii) makes use of his or her own templates (not templates prepared by the applicant), (iv) meets in person with the purchaser and seller to explain and finalise the transfer documents[39], and (v) verifies the accuracy of the information contained therein and assumes responsibility for the correctness of such information.[40] (And indeed, as will be seen below, the software will in fact operate to prevent the applicant from performing any of these functions.)

42. The software gives the conveyancer the option, when preparing the reserved documents, to access information already collected by the applicant. Whether or not the conveyancer opts to make use of this information is left to "*his or her election*".[41] If the conveyancer opts to use this information, then the conveyancer (i) has available a file of <u>certified copies</u> of the original source documents (for example, the parties' identity documents, marriage certificates and the like) against which to check the information[42], and (ii) checks this information against the

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37 Judgment para 51.

38 Para 22 of FA4A.

39 Para 28 of FA4A.

40 See para 24 of FA4A, read together with the second para on p7 of the letter written by the applicant to the law societies on 1 March 2006, p59.

41 Paras 21b and 22 of FA4A.

42 Para 22 of FA4A.

original documents when he or she meets in person with the buyer and seller in order to complete the transfer documents.[43]

43. On a reading of FA4A and FA4B, it is clear that the software merely enables the performance of certain of the tasks set out therein. Significantly, besides performing an enabling function, the software also performs a limiting function in that it will not permit the applicant to perform any of the conveyancer's tasks: "*The process administration software to be used by Proxi will not permit Proxi to perform any Reserved Work*".[44]

44. In summary, that the software remains to be developed to the n-th degree does not make it premature to determine now the core dispute. It will not alter the nature or extent of the steps to be performed by either Proxi or the attorney[45]. (If it did, the applicant would then be conducting itself outside the bounds of the order that it seeks: the principle in ***Jordaan***, *supra* applies.)

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[43] Para 28 of FA4A.

[44] Para 3c of FA4A, remarks column.

[45] As is clear from a consideration of the nature of the steps that the applicant has in mind to perform. To mention some examples, under the model the applicant will: contact the seller to obtain his or her information (para 1 of FA4A); obtain buyer, seller and property-related information from the estate agency (para 4 of FA4A); upload copies of the deed of sale and FICA documents (para 5c of FA4A); contact the local authority for rates clearance figures (para 6 of FA4A); calculate what is due to SARS for transfer duty (para 8 of FA4A); instruct entomologists, electrical installation inspectors and others (para 9e of FA4A); upload copies of the title deed and mortgage bond; notify the seller that the purchaser's deposit has been received (para 17 of FA4A); request notification from the estate agent as to when the condition precedents are fulfilled (para 17 of FA4A); notify the seller that the purchaser's bond is approved (para 18 of FA4A); make payment of the sum due to obtain rates clearance (para 30 of FA4A); make payment of transfer duty to SARS and receive a receipt from SARS (paras 33 and 34 of FA4A); request the required financial guarantees form the bond attorney (para 37 of FA4A); notify the estate agent of the expected lodgement date (para 42 of FA4A); confirm that electrical and other compliance certificates have been provided (paras 43 and 44 of FA4A), and make payment for these (paras 45 to 47 of FA4A); request the estate agency to pay the purchaser's deposit into the purchaser's client transaction account (para 51 of FA4A); once the conveyancer has lodged the transfer documents at the deeds registry, inform the purchaser and seller of this fact (para 55 of FA4A); on receiving notification from the conveyancer that the deeds have been registered, notify all transaction parties (seller, purchaser, estate agency and local authority) of this (para 67 of FA4A); make payment of the deeds registry fee.

45. Finally, we respectfully submit that another court may hold that it verges on the absurd to suggest that because the applicant's software has not been finally developed, it remains at this stage premature to determine whether or not "*the full conveyancing process is reserved work*" by virtue of centuries-old usage, custom and practice.

46. In the circumstances, the court should, with respect, have commenced by determining the principal dispute between the parties (i.e. whether "*the full conveyancing process is reserved work*"); and if it determined that dispute in the applicant's favour, it should then have proceeded to determine whether any of the steps assigned to the applicant in FA4B contravene the statutory provisions identified in paragraphs 1.1.1 to 1.1.4 of the notice of motion.

47. These are, we submit, existing or concrete disputes in which the applicant plainly has a direct or substantial interest. The court, with respect, may reasonably be held to have been confused in its denial even of *locus standi* to the applicant. This because it conflated the suggested lack of standing with the (contended) lack of an exigible right: the distinction between the two inquiries has been explained clearly by Rabie JA (as he then was).[46]

48. It follows that there is at the least a reasonable prospect that the Supreme Court of Appeal may hold that the dismissal of the application on procedural grounds is insupportable, and that this is an appropriate case for the grant of declaratory relief.

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[46] *Wessels v Sinodale Kerkkantoor Kommissie v NG Kerk* 1978 (3) SA 716 (A) at 725H-726A.

V. THE MERITS

49. To summarise our detailed argument thus far, it is submitted that for the reasons already stated, there is a reasonable prospect that the Supreme Court of Appeal may hold that the court was wrong to consider the relief premature; erred in its understanding of the relief; was right (although inconsistent) to address the merits; was wrong to dismiss these. In any event, the matter is clearly such as to warrant an appeal by virtue of its importance.

50. This, we submit, is dispositive of the need for leave to appeal properly to be granted. In what follows, we nonetheless address the prospects of the SCA differing from this court in any or all of its individual main findings on the merits.

(i) Reserved versus non-reserved work: "*of the applicant's making*"?

51. As indicated, the court found that the distinction between reserved and non-reserved work is one "*of the applicant's making*".

52. That is, with respect, incorrect. The placing of certain work within the exclusive preserve of attorneys arises by virtue of the statutory provisions referred in the notice of motion. This moreover has already been so held, in case law the court did not address.[47] The crucial distinction is therefore not "*of the applicant's making*",

[47] Judgment para 9.

but of the making of the legislature, applied by the courts and aptly followed by the regulatory bodies themselves.

53. Moreover, the designation of the categories of work that fall within the exclusive preserve of the attorneys as 'reserved work', while no more than a matter of terminology, is well-entrenched: Our courts have in the past used that terminology[48], the law societies use that terminology[49], and, indeed, the court *a quo* itself – when seeking to convey that certain documents could not lawfully be prepared by anyone other than a practising attorney – referred to those documents as "*reserved documents*".[50]

(ii) <u>The principal dispute was left undecided</u>

54. As is correctly recorded in paragraph 5 of the judgment, the law societies rely for their contention that "*the full conveyancing process is reserved work*" on "*usage, custom and procedure over centuries*".

55. This contention is not dealt with at all in the judgment, despite the fact that it was extensively argued in the course of the two-day hearing, as well as in the various sets of heads of argument. (And we repeat our earlier submission that it cannot seriously be suggested that this question – one of centuries-old practice – is not yet

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48 Compare *Cape Law Society v Hoole* 1975 (2) SA 323 (C) at 324 ad finem – 325A.

49 See for example annexure '**FA3**', p105.

50 Judgment para 14.

ripe for determination. The palpable disinclination of several of the respondents to advance the argument underscores the need for it to receive its quietus.)

56. The court's failure to deal with this, the principal dispute, while recognising at the very outset of its judgment its primacy, is in our submission in itself a basis for granting leave to appeal.

(iii) Section 83(8)(a)(i) of the Attorneys Act: drawing up or preparing reserved documents (or causing reserved documents to be drawn or prepared)

57. We mention first that the legislative landscape has changed in the almost six months since the judgment was delivered on 16 May 2018, in that the Attorneys Act – inclusive of s83(8)(a) thereof – has been repealed with effect from 1 November 2018[51].

58. S83(8)(a)(i) has been replaced by s33(4) of the Legal Practice Act 28 of 2014. Unlike the former, the latter contains no self-standing prohibition on the preparation or drawing up of reserved documents by anyone other than an attorney (a clear recognition by the legislature of the evolving attitude towards the involvement of individuals other than attorneys in the preparation of agreements and other documents relating to immovable property).

59. Nor does any other extant piece of legislation contain provisions equivalent or functionally similar to s83(8)(a)(i) of the Attorneys Act (perhaps unsurprisingly,

[51] See sections 119(1) and 120(4) of the Legal Practice Act 28 of 2014, read together with the schedule thereto; and para (vii) of Proclamation R31 of 2018 in GG 42003 of 29 October 2018.

given the stance of the Competition Commission that the reservation of work to conveyancers is anti-competitive).

60. The result is that the court's finding that the model contravenes s83(8)(a)(i) of the Attorneys Act has become moot. For the sake of completeness, we nonetheless address this finding on its merits in what follows.

61. The factual premise of the court's finding that the model contravenes s83(8)(a)(i) of the Attorneys Act was that the model reduces the role of conveyancers in the preparation of reserved documents to simply 'pushing a button' (with everything else being done by the applicant).

62. We have explained above that there is, at the lowest, a reasonable prospect that this will be held to be misstaken simply at the factual level.

63. When it comes to interpreting s83(8)(a)(i) of the Attorneys Act, the court held that the section requires "*everything involved*" in the drawing up or preparing of reserved documents – i.e. including work of a purely clerical nature – to be undertaken by a practising practitioner.[52]

64. This approach is contrary to that applied by courts of other jurisdictions (particularly England and Australia) to similar legislative provisions, where it has consistently been held that the performance of purely clerical tasks (such as information-gathering) falls outside the prohibition. (The relevant foreign authorities were dealt with extensively in our earlier heads, as well as in the course of oral argument, but no mention is made thereof in the judgment. In the absence

[52] Judgment para 53 read with para 31.

of even a dealing with these authorities in the judgment, it can hardly be said that there is no reasonable prospect that they will not be considered to be correct, or must, on some basis equally not articulated, be distinguished.)

65. On an overview of the foreign authorities (as dealt with in our earlier heads), two tests have been adopted in order to determine whether or not there has been a contravention of the relevant prohibition in circumstances similar to the present ones.

66. The first test is the 'application of the mind' test. If the person accused of contravening the statutory prohibition applied his or her mind or intellect to preparing the document, then he or she "*drew up or prepared*" the document concerned and will have contravened the prohibition on that basis.

67. A distinction is recognised between such a situation, and one where the person so accused merely performed clerical or preliminary work for purposes of preparing the document. (For example, as it was put by O'Connor J in *Green v Hoyle*, "*a person who furnishes the material from which a document is drawn does not draw the document at all*".)

68. In such a situation there will be no contravention of the prohibition.

69. The second test is the 'assumption of responsibility test'.

70. We submit that, on a proper factual conception of the model, Proxi does not contravene s83(8)(a) of the Attorneys Act on either such test.

71. In our submission, s83(8)(a)(i) is to be interpreted such that any person satisfying either the 'application of the mind' test or the 'assumption of responsibility' is

guilty of the offence – though not someone (such as the applicant) who performs exclusively clerical functions.

72. This interpretation strikes an appropriate balance between the need to protect the public, on the one hand, and the need to promote the s22 right to freedom of trade, occupation and profession (which was not mentioned in the judgment), on the other.

73. There is, moreover, no redundancy on this interpretation[53]: An employee of a practising practitioner who applies his or her mind or intellect to the preparation of a reserved document would be guilty of the offence (which is obviously not what is intended), but for the s83(12)(a) exemption.

74. The court's failure to take into account the s22 right to freedom of trade, occupation and profession was, we respectfully submit, in breach of the court's duty in terms of s39(2) of the Constitution[54], and it resulted in the adoption of an imbalanced (and incorrect) interpretation of s83(8)(a)(i).

(iv) <u>Rule 49.17: touting and solicitation</u>

75. It is with respect difficult to discern, in the court's single-sentence analysis[55], its ratio for concluding that the model contravenes Rule 49.17.

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[53] Contrast the second sentence of para 31 of the judgment.

[54] Which provides in relevant part that when interpreting any legislation, every court "*must promote the spirit, purport and objects of the Bill of Rights*". The imperative to interpret s83(8)(a) of the Attorneys Act in a manner that promotes the s22 right to freedom of trade, occupation and profession is all the more pertinent given the Competition Commission's finding that the reservation of work to conveyancers is anti-competitive.

[55] Judgment para 42.

76. Be that as it may, it is apparent that in reaching the conclusion it did, the court with respect failed to have regard to the terms of the introduction agreements between the applicant and estate agencies, in terms of which estate agents (i) may do no more than provide neutral objective information concerning the applicant, and (ii) are expressly prohibited from soliciting or attempting to solicit appointments for the applicant; and that the court failed to apply the test in *McPherson*[56], which entails enquiring whether solicitation or touting is consonant with the terms of the model (which, we submit, they are plainly not). These aspects too are dealt with comprehensively in our earlier heads before the court.

77. Any contravention of Rule 49.17 would in the circumstances result not from the implementation of the model according to its terms, but rather from a breach thereof. The difficulty is then not the model itself, but the implementation thereof (a topic that we have already dealt with above).

78. Finally, it is unclear why the court enquired into Rule 49.17 at all. That rule does not feature in the notice of motion (and while it does feature in the LSSA's counter-application, the counter-application was, as we have mentioned, not determined by the court).

(v) <u>Further factual errors</u>

[56] See the full bench decision in *Law Society of the Cape of Good Hope v McPherson* (13855/08) [2009] ZAWCHC 154 (15 October 2009).

79. We deal below with the further factual assumptions made by the court that are at odds with FA4A and FA4B.

80. The court approached the matter on the basis that the applicant's tasks under the model included selecting the documents that were required to be lodged with a deed of transfer, and that performing this task required "*the exercise of professional discretion and legal knowledge*".[57] The court reasoned further that by checking whether suspensive conditions had been fulfilled, the applicant would "*inevitably be dispensing legal advice*".[58]

81. Without providing a basis for this conclusion, the court described the applicant as being "*in overall control of the registration process*"[59].

82. In reaching this conclusion, and in making the further factual assumptions set out above, the court overlooked the fact that the model provides not only for the registration process itself (comprising both lodgement and registration at the deeds office) to be undertaken by the conveyancer (to the exclusion of the applicant), but also for the conveyancer to select the documents required for registration of transfer, and to prepare those documents. The model provides further for these tasks to be the subject of a separate mandate agreement between the seller and the conveyancer.[60]

83. The preparation of documents – a topic already touched on above – is dealt with in steps 22 to 28 of FA4A. Step 22 expressly provides that it is the conveyancer who

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[57] Judgment para 18.

[58] Judgment para 20.

[59] Judgment para 21.

[60] As referred to, for example, in para 10 of FA4A.

"*applies his or her mind to the specific legal transfer documentation required for the specific type of transfer*".

84. The court's finding or assumption that this task was to be performed by the applicant[61] is therefore incorrect.

85. Under the model, once the conveyancer has determined which documents need to be prepared for the relevant transaction, the conveyancer must then proceed to do the following[62]:

85.1. decide on the format of the required documents;

85.2. prepare the documents, using his or her own templates (the documents to be prepared by the conveyancer to include the following: the 'prep certificate'[63], the deed of transfer[64], the certificate of title[65], the deed of cession referred to in s32 of the Deeds Registries Act[66], the mortgage bond[67], the power of attorney[68], the transfer duty declaration[69], the solvency affidavit[70], any interlineations or amendments to the aforementioned

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61 In para 18 of the judgment.

62 See the summary in the second paragraph on p7 of the letter written by the applicant to the law societies on 1 March 2016, at page 59.

63 Paras 23.2 and 24 of FA4A.

64 Para 23.1a of FA4A.

65 Para 23.1b of FA4A.

66 Para 23.1c of FA4A.

67 Para 23.2.d of FA4A.

68 Para 23.2a of FA4A.

69 23.3a of FA4A.

70 Para 23.3b of FA4A.

documents[71], and any certificate required in terms of s15B(3) of the Sectional Titles Act[72]); and

85.3. verify the accuracy of the information contained in those documents.

86. As indicated, contrary to the finding in paragraph 21 of the judgment that the applicant is "*in overall control of the registration process*", the model in fact puts the conveyancer squarely in control of the registration process.[73] Thus:

86.1. In para 40 of FA4A, it is recognised that "*Lodgement is Reserved Work and will not be undertaken by Proxi.*" ("*Lodgement is the term used to describe presenting the transfer documents at the Deeds Registry to be examined.*")

86.2. It falls to the conveyancer to ensure that the lodgement cover is ready for lodgement in the deeds registry.[74] (The documents that need to be prepared for lodging in the deeds registry – being those dealt with in paragraph 85.2 above – are, as we have explained, prepared by the conveyancer. As set out in paragraph 36 of FA4A, the lodgement cover also includes the transfer duty receipt and the rates clearance certificate. These documents are obtained by the applicant (not prepared by it) from SARS and the local authority respectively, and provided to the conveyancer for inclusion in the lodgement cover. In our submission, the applicant's responsibility for obtaining the transfer duty receipt and rates clearance certificate clearly does not amount to or involve "*the exercise of professional discretion or legal*

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71 Para 23.3d and 25 of FA4A.

72 Para 35 of FA4A.

73 In general, see paras 35, 36, 40, 54, 56 of FA4A.

74 Para 36 of FA4A.

knowledge"[75], "*dispensing legal advice*"[76], or assuming "*overall control of the registration process*"[77].)

86.3. The conveyancer then lodges the transfer documents at the deeds registry and, once they have been successfully examined, the conveyancer proceeds to execute those documents before the registrar and to have them registered.[78]

87. Suspensive conditions in the sale agreement in question[79] are dealt with as follows in paragraphs 17 and 18 of the FA4A:

> "17. *Proxi receives notification from the estate agency that the purchaser's bond is approved with a copy of the letter of approval. Proxi requests and receives notification that any other conditions precedent are fulfilled.*
>
> *18. Proxi notifies the seller that the purchaser's bond is approved and that any other conditions precedent are fulfilled."*

88. It will be seen that the applicant is here acting as the interface between the estate agent and the seller (whereas, as a matter of existing practice, the estate agent would ordinarily inform the seller that the buyer's bond had been approved, and would enquire into the fulfilment of any other suspensive conditions). This minor shift of responsibility from the estate agent to the applicant does not, we submit, constitute any incursion by the applicant into work that is by law reserved to conveyancers or attorneys.

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75 Judgment para 18.

76 Judgment para 20.

77 Judgment para 21.

78 Paras 54, 56, 59, 65 and 66 of FA4A.

79 Compare para 20 of the judgment.

VI. ‘COMPETENCE’ OF THE RELIEF: TERMS AND FORMULATION OF THE ORDER SOUGHT

89. The court reasoned in this regard that the relief was premature; and that the order formulated in the notice of motion was “*vague, unenforceable and* [would] *not bring finality to what conduct the court* [had] *sanctioned*”[80].

90. We have already dealt above with the question of prematurity. We repeat our submission that the court erred in deciding that the issues raised by the relief sought – being (i) whether or not the law societies are correct in asserting that “*the full conveyancing process is reserved*”, and (ii) whether any of the conduct proposed to be undertaken by the applicant contravenes any of the statutory provisions set out in paragraphs 1.1.1 to 1.1.4 the notice of motion – are not yet ripe for determination (and will not be ripe for determination until after the model is implemented).

91. The court erred, too, in approaching the matter as though it were asked to grant some form of mandatory or prohibitory relief (hence, it appears, the court’s professed concern that the order might, if not obeyed, result in a party being held in contempt of court[81]).

92. The court’s concerns in this regard were misplaced, as the relief sought was purely declaratory in nature.

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[80] Judgment para 59.

[81] Paras 54 and 55 of the judgment.

93. In any event, the order as formulated in the notice of motion is, we submit, sufficiently clear. The subject thereof is, as we have explained, the tasks identified in FA4B (not the 'remarks' contained in the adjacent column, which serve merely to provide context and, where necessary, elucidation).[82]

94. Moreover, in so far as FA4B includes "*various technical terms like "E-hub", the "API" and "peripheral service conditions*""[83], each of these terms is, we submit, adequately explained in in FA4B[84].

95. Finally, the grant of relief in the terms sought would, contrary to the finding in paragraph 59 of the judgment, bring finality to the issues framed in paragraph 90 above.

96. For these reasons, we submit that the court erred in finding that the relief sought by the applicant was 'incompetent'.

VII. CONCLUSION

97. For the reasons given above, we submit that the applicant has, at the very least, a reasonable prospect of success on appeal.

[82] Compare para 62 of the judgment.

[83] Para 61 of the judgment.

[84] 'API' in the remarks column of para 4; 'E-hub' in the remarks column of para 5; and 'peripheral service conditions' in the remarks column of para 32 (read together with para 9e).

VIII. OTHER COMPELLING REASONS FOR GRANTING LEAVE TO APPEAL

98. In any event, given the issues of public importance raised by this matter – as set out in paragraph 39 of the application for leave to appeal, and outlined at the outset above – we submit that there are other compelling reasons, as contemplated by s17(1)(a)(ii) of the Superior Courts Act, why an appeal should be heard.

IX. ORDER SOUGHT

99. In the premises, we submit that the court should make an order:

(1) granting the applicant leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order handed down by the court (per Matojane and Van der Westhuizen JJ, and Strijdom AJ) on 16 May 2018; and

(2) that costs in the application for leave to appeal are to be costs in the appeal.

JJ Gauntlett SC QC
M Blumberg

Applicant's counsel
Chambers, Cape Town
3 December 2018